No. 92-1633

In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1992

LEROY LIBERDA,

Petitioner,

vs.

THE CITY OF LIVE OAK, TEXAS, MARK E. JACKLEY, DOUGLAS FAESLER and TIMOTHY BRITT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that a police officer's conduct in displaying his revolver to protect himself and maintain order in the course of an investigatory stop and lawful arrest was objectively reasonable.

2. Whether the court of appeals correctly ruled that an officer, whose conduct in effecting an arrest and investigatory stop is objectively reasonable, is entitled to qualified immunity.

LIST OF PARTIES

The parties are those listed on the cover.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner improperly invokes Rule 10.1(c) as a source of jurisdiction. The Fifth Circuit was following a long line of Supreme Court decisions in holding that it is objectively reasonable for a police officer to utilize a conditional threat of force to quell a volatile situation during an investigatory stop and arrest. *See Graham v. Connor,* 490 U.S. 386 (1989); *Tennessee v. Garver,* 471 U.S. 1 (1989); *Terry v. Ohio,* 392 U.S. 1 (1968). Accordingly, the Fifth Circuit opinion does not conflict with any applicable decision of this court.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This civil rights action arises out of incidents that occurred in and around San Antonio, Texas on January 9, 1987. Leroy Liberda ("Petitioner"), Kenneth Mouille, Grace Rollins, and Laurie Rollins sued Timothy Britt, Mark Jackley, Douglas Faesler, and the City of Live Oak, Texas, seeking damages under 42 U.S.C. § 1983 for the defendants' alleged violations of their Fourth Amendment rights. At the time of the incident, Britt was a Live Oak police officer, Jackley was the Chief of Police of Live Oak, and Faesler was Live Oak's City Manager.

The case was tried twice. In the first trial, the district court granted the defendants' motion for directed verdict against Laurie Rollins. The court held, *inter alia,* that Rollins had failed to present evidence of a constitutionally significant injury. The court also granted a directed verdict with respect to Kenneth Mouille's claim against Douglas Faesler.

The remaining claims were tried to a jury. At the close of the plaintiffs' case, the defendants moved for directed verdict against Petitioner and Grace Rollins. Finding no evidence of constitutionally significant injuries and ruling that the force used was not unreasonable or excessive under the circumstances, the district court granted the motion. Mouille's claims were presented to the jury, which returned a verdict in favor of Britt, Jackley, and the City of Live Oak. Petitioner, Grace Rollins, and Laurie Rollins appealed the directed verdicts against them. *See Mouille v. City of Live Oak,* 918 F.2d 548 (5th Cir. 1990). Viewing the directed verdict in a light most favorable to Liberda, the Fifth Circuit vacated the judgment against Petitioner and remanded the cause for trial. The court affirmed the district court's judgment against Grace and Laurie Rollins.

Upon remand, the case was tried to a jury, which reached a verdict on June 6, 1991. The jury failed to find that "defendant Timothy Britt used excessive force in the manner claimed by plaintiff Leroy Liberda." The district court rendered judgment for defendants on June 6, 1991. Petitioner appealed from that judgment.

The Fifth Circuit affirmed. *Mouille v. City of Live Oak, Texas*, 977 F.2d 924 (5th Cir. 1992). The court of appeals concluded that Officer Britt was entitled to qualified immunity, that there was a "dearth of evidence" against Chief Jackley or Douglas Faesler, and that Liberda failed to make out a case against the City of Live Oak. Contrary to the penultimate paragraph in the Petition, the court did not ground its affirmance on petitioner's failure to prove a "significant injury.' The court *expressly* declined to address that question. *Id.* at 929.

B. Statement of Facts.

At all times relevant to this case, Petitioner and Grace Rollins were partners in L & R Associates, an insurance agency located at 4538 Walzem Road in San Antonio, Texas. Kenneth Mouille, a plaintiff at trial but not a party to either appeal, was associated with L & R Associates as an independent insurance broker. Grace Rollins' daughter, Laurie Rollins, was employed by L & R Associates as an insurance salesperson.

On Friday morning, January 9, 1987, Officer Timothy Britt clocked a blue Corvette driving 67 miles per hour on Toepperwein Road, which had a posted speed limit of 40 miles per hour. Officer Britt trailed the Corvette onto Interstate 35. After closing the distance between the two vehicles to discourage any reasonable thoughts of evasion, Officer Britt activated the overhead emergency lights on his marked patrol unit. (R. XII, 164-67). The driver of the Corvette, later identified as Kenneth Mouille, fled

down the interstate at speeds exceeding 95 miles per hour. (R. X, 121). In addition to the police dispatcher, a Live Oak police lieutenant, Officer Garry Hopper, monitored the radio dialogue contemporaneously with the pursuit. (R. XII, 231).

According to the official logbook, Officer Britt informed the dispatcher at exactly 11:28 a.m. that he was southbound on I-35 in pursuit of the Corvette. Two minutes later he reported the Corvette's license number and advised that Mouille had exited at Walzem Road. The Corvette finally stopped in the parking lot of L & R Associates, 4538 Walzem Road, which was within San Antonio's city limits. (R. XII, 190-91; Def. Exh. 3).

Both drivers emerged from their vehicles. Mouille was approximately 6 feet, four inches tall and weighed 200 pounds. Officer Britt was outfitted in a distinctive police uniform consisting of blue pants, a blue shirt with police department emblems on both shoulders, a silver police badge, a silver name tag, and a standard black leather gun belt. As Mouille walked toward the rear of the Corvette, Officer Britt identified himself and told Mouille he was under arrest. Mouille responded with a contemptible gesture and verbal epithets. He then bolted through the front door of the building and into the small outer office of L & R Associates. Officer Britt ran behind Mouille and entered the building through the same door Mouille thrust open moments before. (R. XII, 168-174). No one else testified about events occurring in the parking lot prior to Mouille's arrest inside the building. Mouille did not testify at all in this second trial. As will be seen, the interior confrontation was the subject of conflicting testimony.

Officer Britt testified that Mouille immediately began crying out for his "mommy." Responding to Mouille's excited pleas, Grace Rollins entered the room and positioned herself between her son and Officer Britt. The officer told Ms. Rollins about the high-

speed pursuit and advised her Mouille was under arrest. Officer Britt then moved to handcuff Mouille. When he took hold of Mouille's hand, Mouille resisted by shoving the officer. Officer Britt managed to handcuff Mouille on his second attempt. (R. XII, 172).

Shortly after he had physical control of the still-hysterical Mouille, Officer Britt observed Petitioner and Laurie Rollins entering the room. (R. XII, 172-73). He was surrounded by unpredictable strangers and their screaming protests. Fearing for his safety, Officer Britt drew his revolver and admonished them to "back off." Britt began to escort Mouille out of the building as the onlookers' screaming reached fever pitch. Instead of retreating, Petitioner, Grace Rollins and Laurie Rollins continued to walk toward the arresting officer. (R. X, 123; R. XII, 173). Only after the officer exited the building with Mouille did the onlookers stop advancing. Officer Britt then holstered his weapon and placed Mouille in the patrol car. At precisely 11:36 a.m., he informed the dispatcher that Mouille was in custody. (R. XII, 190). At 11:38 a.m., Officer Britt gave the dispatcher the street address for L & R Associates. By 11:56 a.m. Officer Britt and Mouille were en route to police headquarters. (R. XII, 191; Def. Exh. 3).

Petitioner's account of Mouille's arrest focused on threats Officer Britt issued to assert control over bystanders in the office. Petitioner and Grace Rollins had allegedly been meeting in an interior office when they heard commotion emanating from the front office. (R. X, 22). By the time Petitioner made his way there, Officer Britt was two to three steps inside and was purported to have shoved Laurie Rollins. (R. X, 27, 81). In a matter of seconds, Officer Britt faced not only the suspect but also three vocal and unknown interlopers. He told them he was looking for the driver of the sports car. Petitioner repeatedly exclaimed to the uniformed officer: "Who in the hell are you!" and "What are you doing here!" (R. X, 22-23, 82). Officer Britt reportedly drew his revolver in

response to Petitioner's combative inquisition and in tandem with Kenneth Mouille's entrance into the front office. (R. X, 24, 87). Petitioner, the most overtly confrontational of the spectators, advanced to within an arm's reach of Officer Britt. (R. X, 22, 41, 46-49; R. XII, 17, 25, 37). By all accounts the atmosphere in that cramped office was tense, the proclivities of the onlookers, uncertain, and the events, rapidly evolving. (R. X, 22-25, 121-24; R. XII, 168-177).

According to Petitioner, the officer pointed the weapon at him and pulled the hammer back, threatening to shoot. (R. X, 22-23, 89-90). Petitioner's assertion that the revolver was lodged "against" his neck is not substantiated by the record. (R. X, 46). In any event, reacting timorously to Officer Britt's display of the weapon and use of bellicose speech, Petitioner leaped backwards and hit his back against a door knob. Officer Britt handcuffed Mouille and exited the building. As he retreated from the building, Officer Britt warned the onlookers he would shoot if they failed to keep their distance. (R. X, 23-24). Petitioner conceded that the entire episode took as little as two or three minutes. (R. X, 83; Def. Exh. 2).

Officer Gary Hopper, at the time a lieutenant and supervisor of the Live Oak police department, monitored Officer Britt's pursuit of Mouille and arrived on the scene shortly after Mouille was placed in custody. (R. XII, 231). Officer Hopper stated he interviewed Petitioner, Grace Rollins and Laurie Rollins to determine what had transpired. (R. XII, 232-33). Their complaint was directed exclusively to their treatment as spectators to the arrest of Kenneth Mouille. In their subsequent recorded statement to the Live Oak Chief of Police, Petitioner and Grace Rollins emphasized that "the key" to their complaint was Officer Britt's having threatened them in the course of arresting Kenneth Mouille. (Def. Exh. 2).

REASONS FOR DENYING THE WRIT

The question presented by the Petitioner was fully addressed by the Fifth Circuit. The facts and controlling authorities, including decisions of this court, were carefully considered by the court of appeals. The analysis and reasoning of that court is unassailable.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A POLICE OFFICER MAKING AN INVESTIGATORY STOP HAS THE RIGHT TO DISPLAY HIS WEAPON TO QUELL VOLATILE SITUATIONS UNDER RAPIDLY EVOLVING AND UNPREDICTABLE CIRCUMSTANCES.

The Fifth Circuit did not, as Petitioner states, apply a "significant" or "severe" injury test in affirming the district court's judgment. In fact, the court was emphatic that the extent of Petitioner's claimed injury played absolutely no role in its resolution of the case. *Mouille*, 977 F.2d at 929. Rather, the court rested its decision on the precise factor which Petitioner concedes is controlling: to-wit, the objective reasonableness of Officer Britt's conduct under the circumstances. As will be seen, since Officer Britt's conduct was found to be objectively reasonable, he was entitled to the defense of qualified immunity.

The doctrine of qualified immunity protects governmental officials performing discretionary functions from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "[W]hether an official protected by qualified immunity may be held personally liable for an alleged unlawful official action turns on the 'objective

legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken.' *Id.* (citations omitted). In the case at bar, Officer Britt's entitlement to qualified immunity must be analyzed in terms of the law in existence on January 9, 1987. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("if the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."

At the time Officer Britt engaged in the high-speed pursuit of Kenneth Mouille, chased him into the office, and was confronted by Mouille, Petitioner, Grace Rollins and Laurie Rollins, this Court had ruled that a police officer making an investigatory stop had the right "to take steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Terry v. Ohio*, 392 U.S. 123 (1968). An officer in reasonable fear for his safety was thus permitted to neutralize the danger associated with an investigative stop. *Id.* at 26.

The existence of an officer's prudent fear of the unknown proclivities of strangers propelled the court of appeals to conclude that, under the *Shillingford* test applicable at the time of the January 9, 1987 incident, Officer Britt's conduct was objectively reasonable.[1] *See Shillingford v. Holmes*, 634 F.2d 263 (5th Cir.

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1. Petitioner contends that *Shillingford* was not Fifth Circuit law at the time of the incident. This position is contrary to decades of Supreme Court decisions. "Objective legal reasonableness" of the action is assessed in light of the legal rules that were "clearly established" at the time such action was taken. *Anderson v. Creighton*, 483 U.S. at 639. Accordingly, the court properly analyzed the case under *Shillingford* because that decision governed actions involving allegations of excessive force at the time of *Mouille's* arrest. *Mouille*, 977 F.2d at 928.

1981). The court concluded as follows:

> When Britt saw Liberda approaching him menacingly — he did not know what Liberda's intentions were. If he were to passively await the outcome he may have been injured or even worse. The constitution does not empower private citizens to imperviously interfere with police business. The jury found that Britt did not use excessive force and *we too agree that Britt acted reasonably when he attempted to quell a volatile situation under rapidly evolving and unpredictable circumstances.* Therefore, Britt's actions were not grossly disproportionate to the need for action.

Id. At 929 (emphasis added).

The court's holding in this case completely eviscerates Petitioner's stated ground for granting writ. Even if the 1989 *Graham* decision were applicable to Officer Britt's qualified immunity defense, the court of appeals concluded that "the officer's actions [were] objectively reasonable in light of the facts and circumstances confronting [him] . . ." *Graham*, 490 U.S. at 397.

The Fifth Circuit repeated that conclusion in analyzing whether Officer Britt's actions were "malicious." *Mouille*, 977 F.2d at 929. Once again, the court concluded that Petitioner's interloping actions during Officer Britt's attempt to arrest Kenneth Mouille justified the conditional threat of force employed by Officer Britt. The court observed as follows:

> . . . we focus on the third prong of *Shillingford* and consider whether Britt acted so

> maliciously that it shocks the conscience. Objectively, we must analyze Britt's actions, and consider whether a reasonable officer would use a firearm to protect himself when approached by unknown individuals during the course of an arrest. *We conclude that Officer Britt's actions were objectively reasonable and not excessive, given the circumstances.* Indeed, they do not shock the conscience.

Id. (emphasis added). Petitioner has suppressed these holdings in favor of an unsupportable theory that the court require Petitioner to prove a "significant or severe injury." Nothing could be further from the truth.

II.

IN THE CONTEXT OF THIS CASE, WHETHER OR NOT PETITIONER WAS REQUIRED TO PROVE A SIGNIFICANT OR SEVERE INJURY IS A QUESTION OF ACADEMIC INTEREST ONLY AND, FOR THIS REASON, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The only reference the Fifth Circuit ever made to an injury requirement was to emphasize that its opinion rested on entirely independent grounds. As to Petitioner's claim that the court improperly charged him with the burden of proving a "severe" injury, the court stated: "The severe injury prong of *Shillingford* need not be addressed." *Mouille,* 977 F.2d at 929. With respect to Petitioner's incessant critique of the Fifth Circuit's opinion in *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989) (en banc), the court offered the following observation:

> . . . anything that we say regarding *Johnson*

> would be *dicta* for two reasons: (i) because we find that Britt is entitled to qualified immunity under *Shillingford's* second and third prongs, we need not address the first prong; and (2) Britt is not bound by legal developments that occurred after 1987.

Mouille, 977 F.2d at 929 Petitioner has nevertheless convinced himself that the Fifth Circuit "held that the Petitioner did not show [a significant injury] and thereby ruled his rights had not been violated." (Petition at 10). Since the Fifth Circuit's opinion conclusively negates that conception, and because the court correctly concluded that Officer Britt's conduct was objectively reasonable, Petitioner has presented nothing in this case for review. Petitioner's arguments concerning the Fifth Circuit's significant injury requirement must await the day when that question is actually ripe for determination.

III.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO HOLD THE CITY, JACKLEY, OR FAESLER LIABLE.

A. City of Live Oak is Not Vicariously Liable.

Petitioner's original complaint alleged that the Live Oak Police Department had a policy "to utilize excess force and intimidation in placing alleged criminal suspects under arrest and to use their service weapons without cause or reason." He further alleged, generally, that the City's training policy violated his Fourth Amendment rights. At trial, however, Liberda presented absolutely no evidence to substantiate these allegations.

In *Monell v. New York City Department of Social Services*, 436

U.S. 658 (1978), this Court held that a municipality may not be held liable under *respondeat superior* for the constitutional torts of its employees. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

In the present case, Live Oak's policy concerning use of the threat of force required its officers to conform to the Texas Penal Code provisions respecting such use. Petitioner has never alleged nor attempted to prove that a policy of compliance with that Code is unconstitutional. Therefore, there is absolutely no evidence in the record that the City adopted an unconstitutional policy favoring the use of excessive force.

Nor has Petitioner proved an inadequacy of training amounting to "deliberate indifference to the rights of persons with whom police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). In order to prove that the City's training procedures violated section 1983, Petitioner was required to prove that:

1. the training procedures of the municipality's policymaker were inadequate;

2. the municipality's policymaker was deliberately indifferent in adopting the training policy; and

3. the inadequate training policy directly caused Petitioner's injury.

Id.; *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 79 (1992). Moreover, it is not enough simply to prove an isolated instance of police misconduct.

Oklahoma City v. Tuttle, 471 U.S. 808, 821-822 (1985).

On appeal, Petitioner advanced the wholly unsupported proposition that a City's failure to specifically train its officers "in making arrests inside of a private business" constitutes a deliberately indifferent failure to train. That proposition is logically equivalent to holding a municipality liable under section 1983 for failing to train its officers how to make an arrest in a national park, or inside a mobile home, or underwater. Unless there is specific authority or expert evidence pointing to a constitutional requirement for an arrest policy specifically drafted for potential locations of the arrest or investigatory stop, Chief Jackley's testimony on the subject should be dispositive:

> Q. Is there a written policy, Officer, as to the use of excessive force inside of a private residence or a place of business?
>
> A. There is a policy in reference to the use of force and to the use of deadly force, not to specific locations or generality.
>
> Q. All right. So there would not be a written policy as to the use of excessive force inside of a private house or a business place?
>
> A. The existing policy would cover any and all situations you would be confronted with.

(R. XII, 126). Petitioner has not provided the court with any evidence that the current training is deficient in a manner which offends the Constitution. Since there is no proof the training is inadequate, there can be no finding that a Live Oak policymaker was deliberately indifferent in its adoption. *See Bennett v. City of Grand Prairie, Texas*, 833 F.2d 400, 410 (5th Cir. 1989). Petitioner

has failed to adduce evidence that "the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. at 390; *Benavides v. County of Wilson*, 955 F.2d at 968, 972 (5th Cir. 1992). Finally, since the Fifth Circuit was correct in concluding that the officer's conduct was objectively reasonable, there can be no municipal liability. *See Collins v. Harker Heights, Texas*, 503 U.S. __ (1992) (first step in analyzing § 1983 claim against municipality is to determine whether harm was caused by a constitutional violation).

B. Chief Jackley and City Manager Faesler are Entitled to Qualified Immunity.

Liberda sued Jackley and Faesler in their individual capacities. Each of these defendants asserted qualified immunity. Petitioner does not claim either that Chief Jackley or Douglas Faesler was personally involved in the January 9, 1987 incident. The fact that Chief Jackley was Officer Britt's supervisor, without more, is insufficient to hold Chief Jackley individually liable for his subordinate's actions. *See, e.g., Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir. 1985). Similarly, Douglas Faesler's position as City Manager does not automatically make him individually liable for all Live Oak employees' actions. Supervisory liability exists only if the policy "itself is a repudiation of constitutional rights" and is the "moving force of the constitutional violation." *Grandstaff v. City of Borger*, 767 F.2d 161, 169 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). Accordingly, there is no evidence in this record to justify the imposition of individual liability against Chief Jackley or Douglas Faesler.

CONCLUSION

Petitioner has not presented any question justifying Supreme Court review. For the reasons set forth in this brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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